(10)

No. 05-5224

Supreme Court, U.S.
FILED
OCT 25 2005
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

NANCY COLLINS
WASHINGTON APPELLATE PROJECT
1511 Third Avenue
Suite 701
Seattle, WA 98101
(206) 587-2711

JEFFREY L. FISHER
Counsel of Record
LISSA WOLFENDALE SHOOK
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

RECEIVED
OCT 27 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, Petitioner Adrian Martell Davis respectfully submits the following authority decided since the filing of his reply brief in support of certiorari: *United States v. Brito*, ___ F.3d ___, 2005 WL 2673671 (1st Cir. Oct. 20, 2005); *State v. Mann*, 2005 WL 2714531 (N.H. Super. Oct. 21, 2005).

These two new decisions, both of which hold that "excited utterances" describing recent criminal activity to 911 operators are not testimonial, acknowledge and deepen the split of authority concerning the question presented in this case. These decisions also further confirm that no evidence beyond that already contained in this case's record is necessary to decide whether these kinds of out-of-court accusations are testimonial. The First Circuit resolved the issue on the basis of a pre-*Crawford* trial record, and the New Hampshire Superior Court resolved the issue on the basis of a post-*Crawford* hearing that focused on exactly the same factual considerations as the Washington Supreme Court: "the [declarant's] demeanor, 'the temporal proximity to the incident, and the nature of the dialogue between [the declarant] and the operator.'" *Mann*, 2005 WL 2714531, at *4 (quoting *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005)).

RESPECTFULLY SUBMITTED this 25th day of October, 2005.

JEFFREY L. FISHER
Counsel of Record
LISSA WOLFENDALE SHOOK
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150

NANCY COLLINS
WASHINGTON APPELLATE PROJECT
1511 Third Avenue
Suite 701
Seattle, WA 98101
(206) 587-2711

No. 05-5224

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

RECEIVED
OCT 27 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2005, I caused to be served true and correct copies of the following documents by the method indicated below and addressed as follows:

Supplemental Brief Supporting Petition for Writ of Certiorari
Certificate of Service

James M. Whisman
Senior Deputy Prosecuting Attorney
516 Third Avenue, W554
Seattle, WA 98104
Tel: (206) 296-9600

_____ U.S. Mail
__x__ Hand Delivery
_____ Overnight Mail
_____ Facsimile

Timothy P. O'Toole
Public Defender Service for the District of Columbia
633 Indiana Avenue, N.W.
Washington, DC 20004
Tel: (202) 628-1200

__x__ U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile

DATED this 25th day of October, 2005.

JEFEREY L. FISHER

Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SHANGHAI WASHINGTON, D.C.

JEFFREY L. FISHER
DIRECT (206) 628-7615
jeffisher@dwt.com

2600 CENTURY SQUARE
1501 FOURTH AVENUE
SEATTLE, WA 98101-1688

TEL
FAX
www.dwt.com

via FEDERAL EXPRESS

October 25, 2005

Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

Re: **Adrian Martell Davis v. State of Washington**
Supreme Court of the United States, No. 05-5224

Dear Clerk:

Enclosed please find the original and ten copies of Supplemental Brief Supporting Petition for Writ of Certiorari and Certificate of Service. Please return conformed copies in the prepaid envelope provided.

Thank you for your assistance in this matter.

Very truly yours,

Davis Wright Tremaine LLP

Jeffrey L. Fisher

JLF:mnb

Enclosures

cc: James M. Whisman (w/Enclosures)
Timothy P. O'Toole

RECEIVED
OCT 27 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BEST AVAILABLE COPY